State of Michigan
Supreme Court
Appeal from the Michigan Court of Appeals
[Kelly (M.J.), PJ., Cavanagh and Servitto, JJ.]

Kimberly Marie Marik, Plaintiff-Appellee, v Peter Brian Marik, Defendant-Appellant.	Supreme Court No. 154549 Court of Appeals No. 333687 Trial Court No. 2011-0651-DM Macomb Circuit Court – Fam. Div. Hon. Kathryn A. George

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Defendant-Appellant's Reply to Answer to Application for Leave to Appeal

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Plaintiff claims this case is a "poor vehicle" for review of whether an order deciding a school choice dispute between joint legal custodians is a final order appealable by right. She is incorrect. The parties have an almost equal division of parenting time. Defendant never "abandoned" his belief that the children would be better served by attending Our Lady of Refuge School instead of Kenbrook Elementary. Instead, he choose not to disrupt the children mid-year after plaintiff unilaterally enrolled them at Kenbrook in 2011.

The circumstances were different by the spring of 2016. The Farmington Schools are struggling with decreased enrollment and financial troubles. Kenbrook was on the 2015 Building and Site Utilization committee list of recommended school closures. Although it remains open after receiving a reprieve during the spring of 2016, closure in the near future remains possible.

Defendant was remarried and lived with his wife and 15-year-old stepdaughter in Waterford. MI. Defendant was concerned that plaintiff and her family were actively undermining his relationship with the children by speaking of him negatively, depriving him of access to the children's homework, failing to advise him of the children's medical treatment, refusing to participate in counseling, among other things. A change in school enrollment, with its associated change in parenting time, would address all of these concerns.

Plaintiff also questions defendant's decision to seek reconsideration of the initial administrative dismissal of this appeal by the Court of Appeals. There was good reason to seek reconsideration in that court. Defendant's counsel was involved in a case presenting

the same issue where an appeal by right was dismissed administratively, then reinstated after reconsideration review by a three-judge panel. That case went on to be the subject of a published opinion by the Court of Appeals and a leave grant and decision by this Court. *Pierron v Pierron*, 282 Mich App 222; 765 NW2d 345 (2009), *aff'd on other grounds*, 486 Mich 81; 782 NW2d 480 (2010).

At the time defendant's reconsideration motion was filed on July 19, 2016, this Court had not yet ruled on the application for leave to appeal in *Ozimek v Rodgers*, COA No. 331726; SC No. 154776. The next day, July 20, this Court vacated the COA dismissal order in *Ozimek* and remanded to the COA for issuance of an opinion addressing whether an order identical to the one is this case is a final order appealable by right.

Plaintiff's speculation about the motivations of "a small group of family law appellate attorneys" is a mere distraction. The only relevant point is that the appellants in each of the three cases have important arguments to make concerning interpretation of MCR 7.202(6)(a)(iii). Each appellant has a case in a different circuit and it represented by a different attorney. Other than presenting the same issue, the three appellants have no connection. Appellants' respective attorneys have practices that are either limited to or consist largely of family law appeals. However, nearly every attorney handling family law appeals has wrestled with the issue of what is and what is not a final order under MCR 7.202(6)(a)(iii).

Plaintiff's statement that if defendant's view prevails, "few, if any, postjudgment orders in domestic relations cases would be exempt" from treatment as a final order reveals a misunderstanding of the law of joint legal custody in Michigan. Joint legal custodians

share decision-making only on "important decisions affecting the welfare of the child." MCL 722.26a (7)(b). There is ample case law limiting such decisions to issues of health care, religious upbringing, and education. Plaintiff's claim that "every disputed decision" would be appealable by right is a misleading exaggeration.

Reply to Counter-Statement of Question Presented

Plaintiff revises the Question Presented to suggest that a parent may not withdraw a motion affecting his children without jeopardizing his right to bring future motions on the same of similar issues. She fails to acknowledge that withdrawal of a motion is not a decision on the merits. She also fails to acknowledge that when dealing with the welfare of young children, the "reality on the ground" is very fluid. Facts change.

In 2011, the children were just staring school. Plaintiff's unilateral action deprived defendant of his right as a joint legal custodian to participate in the school enrollment decision. The children were already in school. Withdrawal of his motion was not a waiver of his right to ask the court to address that issue in the future based on changed circumstances.

Parents with joint legal custody share an obligation to act in the best interests of their children. That may include bringing important issues back to the court for review. Courts are not entitled to assume that resolution of an issue when the children are five years old precludes either parent from bringing the same issue back to the court for resolution four years later when the children are nine years old if there is once again a disagreement between joint legal custodians.

Reply to Grounds for Denying Appellant's Application for Leave to Appeal

Plaintiff again engages in gross exaggeration that misleads this Court. Plaintiff's assertion that defendant's position would so broaden the rule that few postjudgment orders would be exempt from "final order" status is preposterous. There would be no new flood of appeals by right from post-judgment orders.

As proof, one need only look at how the Court of Appeals applied the final order rule in the past. From well over two decades, at least *Lombardo v Lombardo*, 202 Mich App 151; 507 NW2d 788 (1993), appeals from orders resolving school enrollment disputes between joint legal custodians have been treated by the Court of Appeals as "affecting custody" and therefore appealable by right. This was true until the unanticipated administrative dismissals in *Ozimek* and *Marik*. Yet during this extended period, there was no flood of post-judgment appeals unreasonably burdening our appellate courts. This issue is raised now only because the Court of Appeals suddenly changed its long-standing interpretation of a rule promulgated by this Court.

Both the Court of Appeals and this Court have long resisted allowing the label assigned to an order determine whether it qualifies as a "postjudgment order affecting the custody of a minor" under MCR 7.202(6)(a)(iii). As this Court recognized in *Thurston v Escamilla*, 469 Mich 1009; 677 NW2d 28 (2004), it whether an order "affects" custody, not whether it is called a custody order, that is dispositive as to whether it is a final order. Note that the rule doesn't say "changes" custody.

Contrary to plaintiff's argument, the question of appellate jurisdiction is jurisprudentially significant, whether this case is viewed on its own on in conjunction with

Ozimek and *Madson*. This case is jurisprudentially significant under MCR 7.305(B)(3) because the Court of Appeals' order dismissing this case, along with the published dismissal decisions in *Madson* and *Ozimek*, contradicts its own prior published opinions. In *Varran v Granneman*, 312 Mich App 591, 604; 880 NW2d 242 (2015), the Court of Appeals held that a decision affecting the legal custody of a minor, which is the essential element of a school enrollment dispute, was a decision affecting custody under MCR 7.202(6)(a)(iii).

However, in both *Madson* and *Ozimek* (and by implication the instant case because of the citation to *Ozimek* in the order denying reconsideration), the Court of Appeals said the opposite:

> [H]ad our Supreme Court intended the court rule to embrace both distinct concepts [legal custody and physical custody], it would have so stated.
>
> An extension of this Court's jurisdiction to incorporate legal custody would so expand the rule as to nullify the qualifying language "affecting the custody of a minor." To extend the court rule to encompass all postjudgment decisions regarding minors in domestic relations appeals would be to return to the jurisdictional standard before the amendment of the court rule.

08/25/16 *Madson* COA Opinion, pp 7-8.

> When the Supreme Court amended the rule in 1994, it clearly intended to limit orders appealable by right. To interpret the court rule as appellant proposes would be counter to that obvious intent. Reinforcing that conclusion is the fact that the court rule does not expressly indicate that it includes the concept of "legal" custody. Had the Supreme Court intended for the court rule to include "legal" custody, it would have included the term. Absent that specific language, this Court should not broadly interpret the court rule.
>
> This Court has not traditionally included legal custody considerations in the interpretation of MCR 7.202(6)(a)(iii) and has dismissed for lack of jurisdiction cases challenging school choice decisions that do not alter parenting time and thus do not influence where the child will live. This

> Court, however, has not always been consistent in its dismissal of cases involving a choice of schools.
>
> ***
>
> Given the lack of clarity regarding whether legal custody should be included in the definition of custody in MCR 7.202(6)(a)(iii), ***we urge our Supreme Court to weigh in on the issue.*** Further, should practitioners wish to promote an expanded court rule, our Supreme Court would be the proper venue for that request.

08/25/16 *Ozimek* COA Opinion, p 6. [Emphasis added.]

Defendant urges the Supreme Court either to amend the court rule to resolve the confusion, or to clarify its intent in an opinion.

Reply to Counter-Statement of Facts

Introduction: Plaintiff's attempts to defame defendant by asserting that he has been represented by numerous attorneys is another of her distractions. There is an important issue before this Court that no amount of name-calling by plaintiff can diminish.

Plaintiff's claims that orders addressing reinstatement of parenting time, passports, etc., would have been appealable by right under defendant's view of the final order rule is without support. The joint custody statute unequivocally states that joint legal custodian's share decision-making authority only on "important decisions affecting the welfare of the child." MCL 722.26a (7)(b). Parenting time orders that do not impact the established custodial environment would not "affect custody" and would likely not be appealable by right under the current language of the rule. Nor would passport or foreign travel issues. Health care, religious upbringing, and education are the three areas consistently held to be important decisions implicating legal custody rights.

First School Motion: In 2012, defendant filed a motion asking the trial court to

resolve a dispute with plaintiff concerning where the children should attend school. The trial court entered an order for evidentiary hearing on that issue. This order, dated August 27, 2012, also provided "***In the interim*** the children will begin school in the Farmington Hills School District for the 2012-2013 school year at Kenbrook Elementary." 8/27/12 order, ¶2 [Emphasis added]. The evidentiary hearing was scheduled for October 16, 2012.

Defendant withdrew his motion before the evidentiary hearing. The children started school and he didn't want to disrupt them in the midst of a school year. T 6/13/16, p 36-37. Therefore, there was no ruling determining which school was in the children's best interests. Contrary to plaintiff's assertion, the 2012 order entered nearly four years earlier is not a bar to defendant in 2016 seeking an order to enroll the children at Our Lady of Refuge based on new facts and circumstances, including the financial problems with the Farmington schools and the possible closing of Kenbrook Elementary.

Factual Background: By early 2016, despite that fact that the children were now more than twice the age they were during the divorce, the original parenting time schedule remained in effect. They attended Kenbrook Elementary in the Farmington School District. The decision to enroll the children at Kenbrook was make unilaterally by plaintiff without discussion with or agreement by defendant.

The Farmington Schools are struggling with decreased enrollment and financial troubles. Kenbrook was on the 2015 Building and Site Utilization committee list of recommended school closures. Although it remains open after receiving a reprieve during the spring of 2016, closure in the near future remains possible.

Defendant was remarried and lived with his wife and 15-year-old stepdaughter in

Waterford. MI. He believed the children's best interests would be served by enrolling them at Our Lady of Refuge, a Catholic school in Orchard Lake, MI. Defendant was also concerned that plaintiff and her family were actively undermining his relationship with the children by speaking of him negatively, depriving him of access to the children's homework, failing to advise him of the children's medical treatment, refusing to participate in counseling, among other things.

Defendant's motion to change school enrollment and modify parenting contained over eight pages of detailed allegations supporting his requested relief. Among them were the superior academic performance of students at Our Lady of Refuge when compared with Kenbrook. He also cited smaller class sizes and a broader-based curriculum at Our Lady of Refuge among several reasons the children should be enrolled there instead of Kenbrook.

In her response to the motion, Plaintiff equated her grant of "primary residence" in the divorce judgment with the right to unilaterally decide where the children attend school. Plaintiff's Response to Defendant's Objections, p 7. This ignores not only the statutory definition of legal custody in MCL 722.26a(7)(b), but also the terms of the judgment itself requiring the parties to consult and cooperate on "decisions involving the health, education, and welfare of the children." JOD, p 3.

By law, and under the parties' own agreement, neither party's preference on school enrollment outweighs the other. When joint legal custodians disagree on school enrollment, "it is the court's duty to determine the issue in the best interests of the child. *Lombardo v Lombardo*, 202 Mich App 151, 159; 507 NW2d 788 (1993). The court is

obligated to resolve the conflict after evaluating the best interests of the children. *Lombardo* rejected the view advocated by plaintiff that the parent with the most physical custody time decides where the children attend school.

Reply to Argument

Defendant does not dispute plaintiff's assertion that the 1994 amendment to the appellate rules was intended to limit appeals by right from post-judgment orders. However, plaintiff is wrong, in arguing that appeals involving custody means only physical custody. That limitation does not exist in the language of the rule. The rule allows an appeal by right from any order affecting custody. An order affecting a parent's the legal custody rights is as much a custody order as one affecting physical custody.

MCR 7.202(6)(a)(iii) does not define "custody." Child custody in Michigan is governed by the Child Custody Act, MCL 722.21 *et seq*. In *Grange Insurance v Lawrence*, 494 Mich 475, 511; 835 NW2d 363 (2013), this Court recognized the dual aspects of custody - both physical and legal. In *Grange*, this Court cited to MCL 722.26a of the Child Custody Act, stating:

> Moreover, the Act allows for myriad possible scenarios in postdivorce familial relationships, recognizing different combinations of legal and physical custody, and offering flexibility in terms of parenting time arrangements.

Id. 494 Mich at 507-508 (FN 67 referencing MCL 722.26(a)).

Contrary to the analysis of the Court of Appeal in *Ozimek* and *Madson*, the joint custody statute cited by this Court in *Grange* declines to separately define legal and physical custody or create a hierarchy between them. Instead, there is simply "joint custody" which may include one or both of the following:

> (a) That the child shall reside alternately for specific periods with each of the parents.
>
> (b) That the parents shall share decision-making authority as to the important decisions affecting the welfare of the child.

MCL 722.26a(7).

Under this statutory scheme, shared decision-making (legal custody) on important decisions is as much "custody" as alternating periods of residence (physical custody). There is no support, and plaintiff cites none, for the view that this Court intended the term "custody" in MCR 7.202(6)(a)(iii) to mean only physical custody. The joint custody statute creating co-equal forms of child custody took effect January 14, 1981. That was more than a decade before the 1994 court rule amendment that restricted appeals by right in post-judgment domestic relations cases except for those affecting custody.

Presumably, when adopting the definition of "final order" in MCL 7.202(6), this Court was fully aware of the statute creating two co-equal forms of child custody. Had this Court intended to allow an appeal by right only from one type of custody order and not the other, it would have so stated in the rule. Instead, this court recognized Michigan public policy created by our Legislature that treats legal and physically custody as co-equally important components of parental rights.

The *Ozimek* language quoted by plaintiff at p 11 is contrary to logic and common sense. This Court's 1994 amended to the rule was intended to limit orders appealable by right. But, contrary to the *Ozimek* quote, it does not follow that the language used in the amendment must be narrowly construed. The orders appealable by right were limited by the amendment itself, which excluded by its terms property enforcement orders, spousal

support orders, and child support orders. However, the amendment used broad language to continue appeals of right for "orders affecting custody."

Nor is there any basis for plaintiff's claim at the bottom of p 11 that an order must meet "a threshold of significance" to earn an appeal by right. Plaintiff's view is contrary to the broad language of the rule, and also is contrary to the history of the rule. First, the 1994 amendment does not use either the word threshold or significant.

That significance is not a threshold for an appeal by right is evidenced by this Court's broad interpretation of another final order provision, MCL 7.202(6)(a)(iv). Until approximately a decade ago, an order granting or denying attorney fees in post-judgment domestic relations matters were not considered by the Court of Appeals to be final orders appealable by right unless the underlying substantive order was also appealable by right. Administrative dismissal orders in such appeals were routine.

For the last decade, all post-judgment orders awarding or denying attorney fees are appealable by right, no matter the amount awarded. Appeals by right contesting a nominal attorney fee award of $100, only fraction of the Court of Appeals entry fee, are accepted by the Court of Appeals. That demonstrates that there is no "significance" threshold.

Plaintiff's argument regarding the specter of serial appeals of right for serial school enrollment motions is specious. It is an argument that would apply equally to annual motions to modify physical custody. If a party annually filed a change of custody motion that was, just as annually, denied by the trial court, that party would retain an appeal by right from each denial order. If an appeal is vexatious, there is a remedy under the court rules. MCR 7.216(C).

Also specious is plaintiff's argument at p 15 that because defendant did not appeal the first "final order" denying his school change request, he is also barred from appealing the second order entered several years later. This illogic would also bar an appeal by right from a denial of a second change of custody motion even if the first denial happened years earlier on different facts.

Plaintiff cannot deny that the Court of Appeals dismissals in *Ozimek*, *Madson*, and the instant case represent a departure from past application of MCR 7.202(6)(a)(iii). In the past, the Court of Appeals permitted appeals by right from school enrollment orders. See *Lombardo v Lombardo*, 202 Mich App 151; 507 NW2d 788 (1993); *Parent v Parent*, 282 Mich App 152, 153; 762 NW2d 553 (2009) [appeal of right from a post-judgment order granting a motion to enroll child in public school in a dispute between joint legal custodians]; *Pierron v Pierron*, 282 Mich App 222; 765 NW2d 345 (2009), aff'd 486 Mich 81 (2010) [an appeal of right from a post-judgment order maintaining children in their current district with joint legal custodians who cannot agree].

There was a recognition, consistent with the joint custody statute, that shared decision making on important issues affecting the welfare of the child was an exercise of custody. Where parents disagree and the court must make a decision, the court is stepping in to exercise an important custody right, just as it would if parents cannot agree on physical custody.

Conclusion/Relief Requested

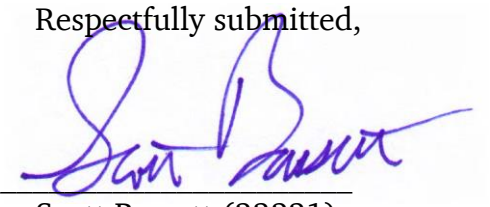
Plaintiff's argument to effectively write out of existence the joint legal custody statute and set up a hierarchy that defines physical custody as the only true custody lacks

statutory or case law support. Shared-decision making on important issues affecting the welfare of the child remains an important exercise of parental custodial rights.

Defendant requests this Court grant leave to appeal. Once granted, this Court should reverse the Court of Appeals dismissal of his appeal by right. The matter should be remanded to the Court of Appeals for full consideration of his appeal as an appeal by right.

In addition, this Court should amend MCR 7.202(6)(a)(iii) to clarify that post-judgment orders affecting either legal or physical custody be considered final orders appealable by right.

Respectfully submitted,



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